

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In RE:) Docket No. 5-IFRA-95-050
Galaxy Chemical Co., Inc.)
Chicago, Illinois)
Respondent.)

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RECOMMENDATION OF DEFAULT

By Motion for Default Judgment, Complainant, the United States Environmental Protection Agency, Region 5 ("U.S. EPA"), moved for an Order assessing a civil penalty in the amount of ten thousand dollars (\$10,000) against Respondent, Galaxy Chemical Co., Inc., for violations of Section 7(c)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. Section 135e(c)(1), and the regulations codified at 40 C.F.R. Section 167, Subpart E, for calendar years 1993 and 1994.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") at 40 C.F.R. Part 22 and based upon the record in this matter and the following Findings of Fact, Conclusions of Law and Determination of Civil Penalty Amount, Complainant's Motion for Default Judgment is hereby GRANTED.

Findings of Fact

1. The U.S. EPA initiated this civil administrative proceeding for the assessment of a penalty pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a).

2. On September 28, 1995, the date on which this proceeding was initiated, Complainant was, by lawful delegation, the Director, Environmental Sciences Division, Region 5, U.S. EPA. The Complainant is currently, by lawful delegation, the Director, Waste, Pesticides and Toxics Division, Region 5, U.S. EPA.

3. Respondent is Galaxy Chemical Co., Inc., which was at all times relevant to this Complaint, a corporation organized under the laws of the State of Illinois with a place of business located at 1620 South Canal Street, Chicago, Illinois 60616.

4. Pursuant to Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and 40 C.F.R. § 167.20, Respondent registered its establishment, located at 167 North Racine Avenue, Chicago, Illinois on June 16, 1975. On January 21, 1976, Respondent submitted to U.S. EPA a notification that the address of its registered establishment had changed to 1620 South Canal Street, Chicago, Illinois. Respondent's EPA Establishment Number is 10700-IL-001.

§ 136e(c)(1), and the regulations promulgated at 40 C.F.R. Part 167, Subpart E.

10. In Count I, Complainant alleged that Respondent violated Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), by failing to submit to U.S. EPA on or before March 1, 1994 or within 30 days of receipt of the 1993 form an annual report describing the types and amounts of each pesticidal product that the Respondent is currently producing, that Respondent produced during the past year, and that Respondent sold or distributed from Respondent's registered establishment 10700-IL-001, during calendar year 1993. Complainant sought a civil penalty of \$5,000 pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), for this violation.

11. In Count II, Complainant alleged that Respondent violated Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), by failing to submit to U.S. EPA on or before March 1, 1995 or within 30 days of receipt of the 1994 form an annual report describing the types and amounts of each pesticidal product that the Respondent is currently producing, that Respondent produced during the past year, and that Respondent sold or distributed from Respondent's registered establishment 10700-IL-001, during calendar year 1994. Complainant sought a civil penalty of \$5,000

19. Respondent operated an "establishment" as defined in Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), and 40 C.F.R. § 167.3 at all times relevant to this Complaint.

20... Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c), and the regulations codified at 40 C.F.R. § 167, Subpart E, require any producer operating a registered establishment to report to U.S. EPA the types and amounts of each pesticidal product that he is currently producing, which he produced during the past year, and which he sold or distributed during the past year. 40 C.F.R. § 167.85(b).

21. A producer is responsible for obtaining, completing, and submitting this report each year, even if it has not produced any pesticidal product for the reporting year. 40 C.F.R. § 167.85(d).

22. This report must be submitted to U.S. EPA on or before March 1, of the year following the calendar year which is the subject of the report. 40 C.F.R. § 167.85(d).

23. The report required by Section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167, Subpart E, must be submitted to U.S. EPA on the "Pesticides Report for Pesticide-Producing Establishments" (EPA Form 3540-16) ("the form"), which is supplied by U.S. EPA. 40 C.F.R. § 167.85(c).

Hearing Clerk within twenty (20) days after service of the complaint.

29. Section 22.07(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.07(b), allows the Regional Administrator to grant an extension of time for the filing of any pleading upon timely motion of a party to the proceeding for good cause shown.

30. Section 22.17(a) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(a), provides that for purposes of the pending action, default by a respondent constitutes

an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

40 C.F.R. § 22.17(a).

31. Respondent is in default for purposes of the pending action for failing to file a timely answer after being granted an extension until November 20, 1995 by the Regional Judicial Officer. For purposes of the pending action, all facts alleged in the complaint are admitted.

32. Respondent's failure to file a timely Answer to the Complaint and to the Motion for Default Judgment is grounds for

Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act, or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the Federal Register (39 FR 27711), and any amendments or supplements thereto.

1. Statutory Criteria - Section 14(a)(3) of FIFRA

Administrative civil penalties for violations of FIFRA must be assessed and collected pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), which provides that in determining the amount of the penalty, the Administrator shall consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business and the gravity of the violation. Section 14(a)(1) of FIFRA authorizes a civil penalty of not more than \$5,000 for each violation of FIFRA.

A. Size of Business

The Dun and Bradstreet report concerning the Respondent estimates Galaxy Chemical's sales at over \$1,000,000 per year. Standard & Poor's Corporate Register lists sales for Galaxy Chemical at \$1,600,000. The American Business Directory lists sales for Galaxy Chemical at \$5,943,000. The administrative

increased because \$5,000 per violation is the maximum amount allowed by Section 14(a) of FIFRA, 7 U.S.C. Section 136(1)(a).

3. Enforcement Response Policy

The applicable civil penalty guideline is the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act dated July 2, 1990 (referred to below as the ERP or the policy), which provides guidance to EPA personnel in assessing penalties with nationwide consistency and in compliance with the statutory factors.

Under the policy, the penalty for each violation is computed in a five-step process. These steps are: 1) determination of gravity or "level" of violation using Appendix A of the ERP; 2) determination of the size of business category for the violator found in Table 2 (page 20 of the ERP); 3) use of the FIFRA civil penalty matrices found in Table 1 (page 19 of the ERP) to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; 4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticides involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in

Complainant found no case specific factors that would warrant an adjustment to the gravity determination.

Step 2 - Size

Using Table 2 on page 20 of the ERP, U.S. EPA determined that the appropriate size of business for Galaxy Chemical was Level I (over \$1,000,000 in gross revenues from all sources during the prior calendar year) based upon reports from Dun and Bradstreet, Standard & Poor's Corporate Register and the American Business Directory.

Step 3 - Use of Matrices to Determine Dollar Amount

Using the FIFRA civil penalty matrix found in Table 1 on page 19 of the ERP, U.S. EPA determined that the dollar amount associated with a violation of gravity level 2 and a size of business category I is \$5,000.

Step 4 - Further Gravity Adjustments

U.S. EPA made no further adjustments of the base penalty using the "Gravity Adjustment Criteria," as the ERP states that the gravity of reporting violations such as those in this complaint are already considered in the dollar amounts presented in the FIFRA civil penalty matrix. Furthermore, as the \$5,000 base penalty is at the maximum amount allowed by Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), U.S. EPA did not increase the base

five thousand dollars (\$5,000), for a total penalty of ten thousand dollars (\$10,000).

ORDER

Based on the foregoing, and pursuant to Section 14(a) of the 7 U.S.C. § 1361(a), it is hereby ordered that:

A. Respondent shall pay the United States of America a civil penalty in the sum of \$10,000.00. Payment shall be made by certified or cashier's check payable to "Treasurer of the United States of America" within sixty (60) days after a final order issues upon default. (See ¶B). Such payment shall be remitted directly to:

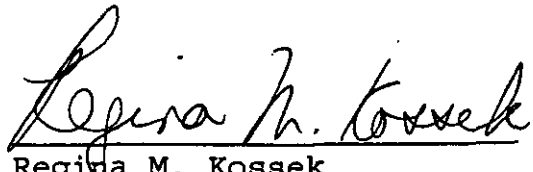
U.S. Environmental Protection Agency
Region 5
P.O. Box 70753
Chicago, Illinois 60673

A copy of the payment shall be mailed to the Regional Hearing Clerk (Mail Code R-19J), Counsel for the Complainant (Mail Code CM-29A) and the Branch Secretary, Pesticides & Toxics Branch (Mail Code DRT-14J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

Department of Justice for collection. The validity, amount and appropriateness of the penalty is not subject to review in a collection proceeding, as stated at 7 U.S.C. § 1361(a)(5).

SO ORDERED.

Dated: Feb. 11, 1997



Regina M. Kossek
Regional Judicial Officer
U.S. Environmental
Protection Agency
Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604